In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 757

FREDDIE JOE WELCH AND PAUL L. TUGWELL,
PETITIONERS

v.

GERALD B. LEAVEY, DEPUTY COMMISSIONER, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT DEPUTY COMMISSIONER IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 397 F. 2d 189. The district court rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1968, and a petition for rehearing was denied on August 21, 1968. The petition for a writ of certiorari was filed on November 19, 1968. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

328-867—68

QUESTION PRESENTED

Whether the Deputy Commissioner's orders, denying the petitioners compensation for permanent partial disability, were supported by substantial evidence.

STATEMENT

Petitioners Paul L. Tugwell and Freddie Joe Welch are longshoremen who sustained back injuries while at work (Pet. App. 2a, 9a). Both men claimed compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*

Tugwell: After a hearing, the Deputy Commissioner found that Tugwell was wholly disabled from July 13, 1958, to October 18, 1958, for which he was entitled to $756.00 compensation; that his earning capacity was reduced between October 19, 1958, and November 1, 1958, for which he was entitled to $88.20 compensation; and that he suffered a 20 percent loss of use of the body as a whole, with maximum improvement occurring on or about May 5, 1961 (Pet. App. 2a, 3a). The Deputy Commissioner denied Tugwell compensation for permanent partial disability, finding:

> 10. As a consequence of his record of substantially increased earnings since November 2, 1958, and in view of his positively demonstrated ability to earn wages in excess of his average weekly wage prior to injury, it is accordingly herewith determined that the claimant has sustained no loss of wage earning capacity as a consequence of his injury of July 12, 1958, within the meaning and intention of the Longshoremen's and Harbor Workers' Act. [Pet. App. 4a.]

Welch: After a hearing the Deputy Commissioner found that Welch's weekly earning capacity was reduced between November 24, 1961, the date of the injury, and May 30, 1963, for which he was entitled to $1,198.43 compensation; and that he suffered a 5 to 10 percent loss of use of the body as a whole, with maximum improvement obtained on May 30, 1965 (Pet. App. 9a, 10a). The Deputy Commissioner denied Welch compensation for permanent partial disability, finding:

> 7. In consideration, therefore, of the claimant's demonstrated ability to earn wages during a substantial period of his disability, which were equal to or in excess of his average weekly wage prior to his injury, and considering the degree or percentage of his physical impairment, his usual employment, and other factors and circumstances which might affect his capacity to earn wages in his disabled condition, including the effect of such disability as it may naturally be expected to extend into the future, it is determined that the claimant suffered no loss of wage earning capacity subsequent to May 30, 1963, as a consequence of his injury of November 24, 1961. [Pet. App. 10a–11a.]

Both petitioners sought review (R. 1, 78); the two actions were consolidated (R. 22, 92); the district court granted the Deputy Commissioner's motions for summary judgment (R. 71, 72, 76, 126); and, on petitioners' appeal, the Court of Appeals for the Fifth Circuit affirmed (Pet. App. 25a), finding "substantial evidence to support" the orders denying compensation benefits (Pet. App. 20a).

ARGUMENT

1. It is settled that the role of the courts on review of the evidence in compensation cases under the Longshoremen's and Harbor Workers' Compensation Act is limited to determining whether the Deputy Commissioner's orders are supported by substantial evidence on the record as a whole. *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359; *Voehl* v. *Indemnity Insurance Co.*, 288 U.S. 162; *Del Vecchio* v. *Bowers*, 296 U.S. 280; *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469; *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504; see, also, *Owens* v. *Traynor*, 396 F. 2d 783 (C.A. 4), certiorari denied, November 25, 1968, No. 529, this Term. In the present case, both the district court and the court of appeals so found with respect to each petitioner (R. 71–72; Pet. App. 20a). This determination does not warrant further review.

Petitioners do not argue that the facts show an actual loss of earning capacity but rather that because their functioning was permanently impaired, such a loss must be presumed. Section 8(c)(21) of the Act, 33 U.S.C. 908(c)(21), governs the right to compensation for permanent partial disability such as petitioners suffered.

> * * * the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability * * *.

Petitioners' claim is that the Deputy Commissioner denied them compensation solely because their post-

injury earnings, as distinguished from earning capacities, were higher than their pre-injury earnings. But while the Deputy Commissioner found that Tugwell and Welch both suffered permanent physical infirmities (Pet. App. 3a, 10a), he also specifically found that neither man's physical condition imposed a "loss of wage earning capacity" (Pet. App. 4a, 11a, 24a). In each case, the post-injury wage earning capacity exceeded the pre-injury wages, resulting in no economic disability. Obviously, if wage-earning capacity after the injury is greater than or equal to average weekly wages prior to the injury, there can be no compensation for the permanent infirmity under the statutory formula. Petitioners' claim is thus unfounded here. Their physical infirmities, unaccompanied by any reduction in earning capacity, are not compensable under the Act.[1] See Section 2(10) of the Act (Pet. App. 37a); *McGrath* v. *Hughes,* 289 F. 2d 403 (C.A. 2).

2. Petitioners also argue that the Deputy Commissioner's order, at least in Tugwell's case, was defective because it lacked an explicit finding that the claimant's actual earnings fairly and reasonably represented his wage-earning capacity. Section 8(h) of the Act, 33 U.S.C. 908(h), added by amendment in 1938, provides:

[1] Petitioners complain that the denial of compensation to them is inequitable because of the assurance of compensation to claimants who receive certain specific injuries, such as loss of an arm or an eye (Pet. 10, 11). However, this distinction is required by the Act. Compare Section 8(c)(1–17) of the Act, 33 U.S.C. 908(c)(1–17), with Section 8(c)(21), 33 U.S.C. 908(c)(21).

> [t]he wage-earning capacity under subdivision (c)(21) of this section * * * shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

As the court of appeals stated, with respect to Tugwell, "the only reasonable inference which can be drawn from the findings is that the Commissioner considered the actual wages as fairly and reasonably representative of Tugwell's wage-earning capacity * * *" (Pet. App. 25a). In the Welch order, as the court of appeals recognized, the Deputy Commissioner considered all the factors which must be taken into account in fixing a claimant's wage-earning capacity in the absence of earnings which "fairly and reasonably represent his wage-earning capacity" and only then determined that his actual wages were equivalent to his earning capacity (Pet. App. 25a). No more explicit finding is required.

3. The decision below does not conflict with the decision of the Court of Appeals for the Fourth Cir-

cuit in *Ennis* v. *O'Hearne,* 223 F. 2d 755, or with the decision of the Court of Appeals for the Second Circuit in *Travelers Insurance Co.* v. *McLellan,* 288 F. 2d 250. In the *Ennis* case the court found only that there was no evidence to support the Deputy Commissioner's finding that the claimant was disabled in the medical sense. In *Travelers,* the Deputy Commissioner had exercised his power to fix a claimant's post-injury earning capacity at a rate different from his actual post-injury wages, but the district court had set his award aside; the reviewing court properly recognized that "[w]hile the employee's wage-earning capacity is normally determined by his actual earnings, this is by no means necessarily so," and reinstated the award. Its view is entirely consistent with the opinion below in this case, as is shown by the approving citation given *Travelers* here (Pet. App. 24a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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